SUPREME COURT, U. S.
MAY 1 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1641

KNAPP-SHERRILL COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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KNAPP-SHERRILL COMPANY, PETITIONER, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 12, 1974, finding that Petitioner violated Sections 8(a) (5) and (1) of the National Relations Act, as amended, 29 U.S.C. Section 151 *et seq.*, (hereafter referred to as the "Act").

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 488 F.2d 655.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was rendered on January 21, 1974, and judgment thereon was entered on February 12, 1974, copies of which are appended to this Petition in the Appendix, beginning at page 1a and page 11a respectively. A Petition for Rehearing was filed by Petitioner with the Fifth Circuit Court on February 27, 1974, which Petition for Rehearing was denied by the Court by its Order of March 18, 1974, a copy of which Order is included in the Appendix at page 12a. Petitioner filed its Motion to Stay Issuance of Mandate on March 25, 1974, which was granted by the Fifth Circuit Court on April 2, 1974, staying the Mandate until May 2, 1974.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Do the provisions of a Stipulation For Certification Upon Consent Election and agreements by and evidence of intent of the parties in connection therewith control in determining eligibility to vote questions in National Labor Relations Board ("Board") elections, as distinguished from Board directed elections?

2. In view of the Board's decision of this case on grounds based upon customary precedents in non-stipulated election cases, rather than giving controlling effect to the provisions of the Stipulation and agreements and intent of the parties which resulted in no

Board findings regarding the latter issues, (a) can the Appeals Court make necessary fact findings in its decision without remand to the Board, and (b) did the Court below correctly find there was no evidence of the parties' understanding and intent regarding eligibility to vote of these challenged voters?

3. If, under the law, the terms of the Stipulation and evidence of the parties' understanding and intent regarding voter eligibility are not controlling in this case, then could the eleven (11) challenged voters be considered on a "temporary layoff' status from Petitioner's employ at the time of the election?

STATUTES AND REGULATIONS INVOLVED

National Labor Relations Act, as amended, ("Act"), §§8(a) (5), 8(a) (1), 7 and 9, 29 U.S.C. §151 *et seq.* (1965), §8(a) (5) of the Act makes it an unfair labor practice for an employer to refuse to bargain with a Union certified to represent its employees which, in turn, interferes with such employees' right to collective bargaining, as provided for in §§8(a) (1) and 7. §9 of the Act involves the authority of the Board to conduct elections among employees to determine their desires for Union representation.

Section 102.62 of the National Labor Relations Board Rules and Regulations and Statement of Procedure provides for Stipulation for elections where hearing is waived, and the bargaining unit, date of election

and other terms regarding conduct of the election is agreed upon. In such stipulations for election, all post-election procedures are as in Board directed elections.

The pertinent portions of such Statutes and Board Rules are set out verbatim in the Appendix hereto beginning at page 13a.

STATEMENT OF THE CASE

This case was appealed to the Court below, requesting it to set aside the Board's Decision finding that Petitioner had violated §§ 8(a) (1) and (5) of the Act,[1] and, incidental to such decision, the Board's prior decision in the election case,[2] which formed the basis of the Union's Certification of Representation of Petitioner's employees.

This is a refusal to bargain case, which raises for Court review Petitioner's contention that the Union's Certification issued by the Board in the prior election case is invalid, because the Board erroneously found that 11 challenged voters were eligible to vote, and such votes affected the final outcome of the Union representative election.

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[1]Reported at 201 NLRB 20 (1973), a copy of such Board Decision and Order is included in the Appendix hereto beginning at page 16a.

[2]Reported at 196 NLRB No. 106 (1972); the pertinent part of such Board Decision is set out in the Appendix hereto beginning at page 30a.

The Union Election and Proceedings Before the Board

An election was held among Petitioner's employees on April 29, 1971, pursuant to a Stipulation for Certification Upon Consent Election ("Stipulation") executed by the Union[3] and Petitioner, as provided by Section 102.62(b) of the Board's Rules. This election resulted in a vote of 85 votes for, and 84 votes against, Union representation. There were two (2) void ballots and 18 challenged ballots cast. After hearing on the challenged ballots, 5 of the challenged ballots were sustained, and 13 overruled by the Board. Of these 13 challenged ballots, 11 are now in contention in this case. The Board, with Chairman Miller dissenting, ruled that the ballots of these 11 votes should be counted. This resulted in a revised election outcome of 93 votes for and 88 votes against Union representation.

Based upon the revised results of the election, the Board certified the Union as the collective bargaining representative of Petitioner's employees, and thereafter the Union requested bargaining. Petitioner refused to bargain on the basis of its belief that the Certificate of Representation issued by the Board was invalid, because of the Board's erroneous counting of these challenged ballots. Thereafter, the Union filed a Charge of unfair labor practice, resulting in the Board's Order finding that the Petitioner had violated §§8(a) (5) and (1) of the Act.

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[3]Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 173.

The Challenged Voters and Petitioners' Operations

These 11 voters were referred to below as "temporary seasonal employees", who are among a large group of potential workers, some of whom work for Petitioner during its peak tomato canning season and occasionally on other vegetable items, though in somewhat more limited number.

Petitioner is engaged in the canning of fresh fruits and vegetables at a canning plant in Donna, Texas. Its operations are highly seasonal, depending upon weather, growing conditions and availability of the fresh fruits and vegetables, which it processes.

The Petitioner has basically three types of employees: *regular employees*, who work most of the year in its warehouse and in maintenance of the plant; *regular seasonal employees*, who are generally hired from time to time throughout the year on various product processing; and *temporary seasonal employees*, or extra employees, who are usually hired only during the tomato packing season. While Petitioner has some 50 to 60 regular employees and some 30 to 35 regular seasonal employees, during the peak of the tomato packing season, it would employ up to 200 different temporary seasonal employees for the few weeks involved at the peak of this packing season. These temporary seasonal employees are drawn from a large group of available workers in the general area as they are needed during this peak seasonal operation. These types of employees are mostly housewives who do this work

on the side, or who also work at other canning plants or in agriculture fields in the area doing similar seasonal work.

These particular 11 temporary seasonal employees had a sporadic work history with Petitioner. Of the 11, there is evidence of actual work history of only 9. During the 5 years prior to the Union election (1966-1970), of these 9, only 6 worked for Petitioner in 1970, 5 in 1969, 4 in 1968 and 1967, and only 1 in 1966. Two had not worked prior to 1971 in several years or, possibly, never before. One worked in 1970 and 1971 but had not worked for Petitioner since 1958; another since 1964. Only 1 worked for Petitioner during each of the last 5 years, but only during the tomato season, which lasts about 4-5 weeks. Only 5 or 6 worked some in 1971 prior to the Union election. After these proceedings began, each of the 11 was hired by Petitioner in the summer tomato season after the Union election; however, this fact is not relevant, because voter eligibility is to be determined upon facts as they existed at the time of the Union election, and not what occurred thereafter. *NLRB v. Jesse James Sausage Co.*, 309 F.2d 664, 665 (4th Cir. 1962); *Whiting v. NLRB*, 200 F.2d 43, 45 (7th Cir. 1952).

The Stipulation and Intent of Parties on Eligibility to Vote

The prelude to the Union election in April, 1971, was certain discussions between Petitioner's Counsel and Union representatives, which resulted in their execution of the Stipulation calling for the Union election. Petitioner's Manager testified regarding the under-

standing of the parties reached at that time as to the eligibility to vote of the seasonal employees.[4] This testimony was based, as the Board stated in its Decision, upon advice of Petitioner's counsel regarding the discussions held prior to the execution of the Stipulation in which only Petitioner's counsel participated.[5] This evidence clearly shows that the par-

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[4]C. M. Sherrill, Jr., testified:

> "Q. When this agreement (Stipulation) was executed what was your understanding of those employees who would be eligible to vote?
>
> "A. It was our understanding that only those that were on the payroll on the period ending March 31, 1971, and those that made up our regular and regular seasonal work force would be included. . . . .
>
> "Q. Did you understand that under the agreement that these extra temporary seasonal people would be entitled to vote as having an interest in the election?
>
> "A. Not if they were not on the payroll, no." (App. 132-133, "App." refers to the Appendix to Brief to the Court below)

[5]Affidavit testimony of Petitioner's counsel, during these representation proceedings, submitted in Summary Judgment proceedings before the Board, regarding preparation of the Stipulation and discussion between the Union and Petitioner's counsel of eligibility to vote of seasonal employees stated:

> ". . . there was no practical way to put into the Stipulation all of the contingencies that might arise regarding seasonal employees who had previously worked, or might hereafter be expected to work, in the plant, and that the only fair thing to do was to agree on one date for one eligibility period, and those that were employed on that period should be eligible to vote, and those who were not would not be entitled to vote. We agreed on March 31, 1971, as the payroll period for this purpose . . . ."
>
> "It was never the intention of any of the people

ties intended that temporary seasonal employees not on the voter eligibility list were not eligible to vote. The Union never disputed this understanding, agreement and intent. The Stipulation[6] provided that only those employed during the week ending March 31, 1971, were eligible to vote, and it was understood that seasonal employees not on the payroll that week would not be eligible to vote.

The Decisions Below

The Board resolved the eligibility of these 11 voters upon the same principles as it does in non-stipulated election cases; namely, by determining the extent to which these employees share a community of interest

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involved (in the agreements reached in the conference leading to the Stipulation) that any persons who had been, or may be, seasonal employees would be entitled to vote, other than those who were employed at the plant during the workweek ending March 31, 1971. The desired purpose of the Stipulation in this regard was to prevent voter eligibility problems with these seasonal workers." (App., p. 79)

The Board held that this evidence did not require an additional hearing, because Manager Sherrill had already offered testimony:

". . . regarding the execution and understanding of the parties to the Stipulation based on advice by Mr. Toothaker. In these circumstances Mr. Toothaker's affidavit does not constitute newly discovered or previously unavailable evidence or special circumstances." (Footnote 4, Appendix hereto page 20a)

[6]The Stipulation in paragraph 2 provided:

"2. Eligible Voters. — The eligible voters shall be those employees included within the unit described below who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were . . . temporarily laid off. . ." (App., p. 3)

with bargaining unit employees. The Petitioner urged before the Board that, in stipulated election cases, it was the Board's function to ascertain the parties' intent regarding eligibility and then to determine whether such intent is inconsistent with any statutory provision or established Board policy; citing *Tribune Co.*, 190 NLRB No. 65 (1971). In its Decisions, the Board answered this contention by holding that, even in stipulated election cases, it could still decide eligibility questions in accordance with its customary precedents and rules; citing *American Printers & Lithographers, Inc.*, 174 NLRB 1179 (1969), decided prior to the *Tribune* case, *supra*. See Board Decisions, Appendix hereto, page 21a and 33a.

The Court below held that although the Stipulation controls unless its provisions are repugnant to the Act or to settle Board policies, absent clear evidence of the parties' intention to apply some other test, the Board can properly resolve eligibility to vote questions in the same manner in stipulated election cases, as in nonstipulated election cases. The Court below also found that there was no evidence that the parties discussed or had any understanding regarding the eligibility to vote of these temporary seasonal employees.

Since the Board below did not consider the Stipulation or the intent of the parties controlling, there were no fact findings by the Board as to the parties' intent. The Court below found that Petitioner had not shown the parties reached any understanding as to the eligibility of these voters and enforced the Board's Decision.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts In Principle With A Decision Of The Second Circuit Court Of Appeals As To The Effect To Be Given Parties' Agreements And Intent In Stipulated Union Representation Elections

In a case involving similar questions, the Second Circuit Court of Appeals held in *Tidewater Oil Company v. NLRB*, 358 F.2d 363 (2d Cir. 1966), that in stipulated elections, the Board's function is to ascertain the parties' intent and *then* to determine whether such intent is inconsistent with any statutory provision or established Board policy. In *Tidewater* ,the Court declined to enforce a Board Order, which did not give effect to a tacit understanding by the parties reached during the conference leading to the stipulation as to the eligibility of an employee to vote, even though this understanding was not reduced to writing and included in the stipulation itself.

Though ostensibly agreeing with this principle without citing the *Tidewater* case, the Court below applied the principle in reverse by not requiring the Board to ascertain the parties' intention regarding voter eligibility and then determine whether this intent was contrary to the Act or Board policy. The Board made no findings regarding the parties' intent or that their intent that these types of seasonal employees would not be entitled to vote unless employed during the agreed-upon payroll eligibility week was contrary to the Act or Board policy. The Board's view was that re-

gardless of the intent and agreement of the parties, it could, nonetheless, decide such questions in accordance with customary Board precedents. The Board, in its decisions, did not even cite *Tribune Company*, 190 NLRB No. 89 (1971), cited by the Court below, but *American Printers & Lithographers, Inc.*, 174 NLRB 1179 (1969), where the Board held that a similar stipulation was not binding and endeavored to distinguish the *Tidewater* case, *supra*, and other cases with similar holdings.

The holding of the Court conflicts with the reasoning, principles and holding of the Second Circuit in *Tidewater, supra*. In *Tidewater*, the Court made it clear that the Board's *function* was to determine the parties' intent and understanding regarding voter eligibility. Unless this intent or understanding conflicts with the Act or Board policies, the Board is to follow this intent or understanding in determining eligibility questions. In the instant case, although alluding to the parties' intent and understanding, the Board failed to make findings in that respect, because of its holding that this intent and understanding were not controlling and did not prevent it from deciding the case on customary principles, as in non-stipulated elections.

The Court below, alluding to the law of the *Tidewater* case, without citing it, and faced with a Board decision that failed to follow it, established a contrary principle that diminishes the effect to be given the parties' intent and understanding in such cases by its holding that, absent clear evidence of intent, the Board can determine the case on principles used in non-stipulated

elections. To recoup the Board's absence of necessary fact finding, the Court then proceeded to make findings which are in conflict with the evidence in the case, and which actually conflicts with inferences prevailing in the Board's decisions that such intent and understandings of the parties did exist but were not controlling in the Board's view.

The conflict created by the Court causes unnecessary confusion in the law regarding the effect to be given to the parties' agreements and intent in stipulated union elections. As discussed below, the policy of the law requires that such agreements and understandings be enforced, or the stipulated election procedures available to parties in labor relations matters will be undermined. This Court has not ruled upon such questions, which are important in the labor-management field. It is requested that the Court resolve this conflict.

2. The Decision Below Raises Significant And Recurring Problems Regarding Eligibility To Vote Questions In Agricultural Seasonal Industries And Review Of Board Decisions

The Fifth Circuit Court's Opinion in the instant case, by diminishing the effect to be given the parties' intent and understanding in stipulated Union elections, creates serious voter eligibility questions in industries employing seasonal employees. The Board has established voter eligibility guidelines in the oil industry, *Hondo Drilling Co.*, 164 NLRB 416 (1967), *NLRB v. Hondo Drilling Co.*, 428 F.2d 943 (5th Cir. 1970), but has not provided similar guidelines in other seasonal in-

dustries. Both the Board and Courts have decided such cases upon the basis of whether seasonal employees are on temporary layoff status, which has legal meaning in nonseasonal industry but not in highly seasonal industries, as reflected by the evidence in this case.

In the instant case, in an effort to alleviate voter eligibility questions, it was understood that only those employed during a particular eligibility week would be entitled to vote. The stipulation for consent election procedure was considered a means by which to resolve the many problems and questions of eligibility to vote in agricultural seasonal industries where there are large numbers of potential seasonal workers in the area, who could come out and vote. In such circumstances, by their sheer numbers, they have a decisive effect on the outcome of any election. This offsets the desires of the more regular employees who have considerable more interest in the question of Union representation. Moreover, in accordance with the Stipulation, the eligibility list submitted by Petitioner and accepted by the Union did not contain the names of these 11 voters or all others in the area in this category. Nor did the notice of the election advise others of their opportunity to vote. The election was not set up on that basis. If these 11 voters are eligible to vote, then reason and fairness dictate that all others in a similar category should be given notice and allowed to vote also.

To avoid the obvious pitfalls under these types of situations, the parties attempted to arrive at a reason-

able procedure of providing that only those employed at a certain time were eligible voters. This was done in view of existing Board and Court cases enforcing the parties' agreements in consent elections, because to permit a repudiation of such agreements would enfeeble the consent election procedure. See, *e.g., Shoreline Enterprise of America, Inc. v. NLRB*, 262 F.2d 943 (5th Cir. 1959); *NLRB v. J. J. Collins' Sons, Inc.*, 332 F.2d 523, 525 (7th Cir. 1964). Moreover, the Courts have enforced agreements providing for final decision on election questions by the Board's Regional Director, (as provided in §102.62(a) of the Board's Rules). *E.g., Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388 (8th Cir. 1947). *cert. den'd.* 332 U.S. 758 (1947).

As noted above, the Court's opinion below creates confusion in the law relating to the enforcement of the parties' intent and understanding regarding voter eligibility in stipulated elections. The Court's opinion not only frustrated the intent and understandings of the parties in the instant case, but also clouds similar cases in the future. The stipulated election procedure is the only procedure available to seasonal industries which accords some degree of stability in the resolution of voter eligibility questions in Union elections. This stability is vitally needed and is very important in these cases arising in seasonal industries over the nation. It is respectfully submitted that direction and clarification of the law is vitally needed by this Court.

Finally, the action of the Court below in making *de novo* fact findings of the parties' intent and understanding without the benefit of Board findings on this issue,

is open to serious question. Here, the Board decided the case on different legal grounds than dictated by the Court in the *Tidewater* case, *supra*, and as apparently indicated by the Court below. In such a situation, the Court had to reconstruct the case and make findings of its own to resolve the case. It is submitted that in such cases, the Board and not the Court should make these findings, so that the question before the Court is one of whether the Board's Order is supported by substantial evidence in the record, which is the accepted scope of review in the judicial review of Board cases. *Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

KNAPP-SHERRILL COMPANY,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

No. 73-1358.

United States Court of Appeals,
Fifth Circuit.

Jan. 21, 1974.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Texas case).

Before JOHN R. BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

Knapp-Sherrill Company (the Company) asks that we review and set aside a Board order[1] finding it in violation of Section 8(a)(5) and (1) of the National La-

[1]Reported at 201 NLRB 20.

bor Relations Act, as amended, (Title 29, U.S.C., Sec. 151 et seq.) for refusal to bargain with the Union[2] certified by the Board as the exclusive bargaining representative of the Company's employees in an appropriate unit. The Board has filed a cross-application for enforcement of its order.

The dispute centers around the proper construction to be accorded to a "Stipulation for Certification upon Consent Election" between the Union and the Company under which the pre-election hearing provided for in Section 9(c)(1) of the Act was waived, the parties agreeing to proceed directly to an election in an agreed-upon bargaining unit which included "[a]ll production and maintenance employees, including warehousemen and truck drivers, employed at the Employer's facilities at . . . Donna, Texas." The Stipulation contained standard printed language stating that the election "shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board." With regard to voter eligibility the Stipulation provided:

> "The eligible voters shall be those employees included within the Unit . . . who were employed during the payroll period indicated below [March 31, 1971], including employees who did not work during the payroll period because they were ill or on vacation or temporarily laid off . . . but exclud-

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[2]Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 173.

ing any employees who have quit or been discharged for cause . . . ."

A secret-ballot election was conducted pursuant to the Stipulation on April 29, 1971, in which the Tally of Ballots disclosed that 85 votes were cast for the Union, 84 against. 18 ballots were challenged by the Board agent because the names of the voters casting them did not appear on the eligibility list supplied by the Company. Because there were sufficient challenged votes to affect the election's result, the Board's Houston, Texas Regional Director investigated the challenges and concluded that substantial issues of fact and law were involved and directed a hearing be held. A hearing ensued before a duly designated Hearing Officer, at which all parties appeared and participated.

The Hearing Officer recommended to the Board that challenges to five of the ballots be sustained but that the challenges to the remaining 13 ballots be overruled and the votes counted. Of these 13 ballots, 11 were cast by so-called "temporary seasonal" employees and one by a "regular seasonal" employee.[3] The Company argued initially that all 13 were ineligible under the Stipulation, but now questions only the votes of the 11 "temporary seasonal" employees.

The Company processes and cans tomatoes, carrots, beets, green beans and citrus juice at various seasons

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[3]The thirteenth ballot was cast by an employee on military leave on the eligibility date and is not here in issue. The single ballot of the "regular seasonal" employee, Juanita De LaGarza is no longer questioned by the Company.

of the year and its need for employees varies considerably with weather and crop conditions. Its two departments, production and warehouse, have a combined total of 50 to 60 regular employees who work full time. At the start of the canning of a particular crop this regular work force is supplemented by about 30 to 35 workers considered by the Company as "regular seasonals" who work on the processing of all vegetables. During the early summer, six weeks tomato canning season, numerous additional employees, 170 to 200 in 1970, for example, are needed. These are called "temporary seasonals" by the Company and they are often used for canning other vegetables than tomatoes during various times of the year. These temporary seasonals are not carried on the payroll records except when they are working but when the workload increases hiring preference is given to those who have worked for the Company in the past. As a result many temporary seasonals work for the Company on a regular basis during the busy seasons. An assistant manager testified "they are generally hired year after year because of their ability to perform the duties that they do perform". He added that while the Company's business may fluctuate, they have a regular need for temporary seasonals at least during the tomato season. This is confirmed by the work history of the temporary seasons whose ballots are at issue. Most of these have worked at least three or four years for the Company and some have worked there for as many as twenty years.

The Hearing Officer concluded that " 'temporary seasonals' worked under the same general conditions

as the regular seasonals whose eligibility is not questioned. The difference rests only in the circumstance that their periods of employment were shorter and less certain than those of the 'regular seasonals' . . . Because of [their] work history and because the record otherwise demonstrates that each had a reasonable expectation of substantial employment from year to year, I find that they shared a community of interest with the Employer's regular work force and the 'regular seasonals'."

The Board (Chairman Miller dissenting) overruled the Company's exceptions to the Hearing Officer's Report and Recommendations and on May 15, 1972, issued its Decision and Direction adopting the Hearing Officer's recommendation that the 13 ballots be opened and counted.[4] The Regional Director opened the ballots and issued a revised tally showing 93 votes for and 88 votes against the Union, to which the Company again objected. The Regional Director recommended that the Board overrule the objection and certify the Union, which action the Board took on June 20, 1972.

The Company thereafter refused to bargain with the Union as the representative of the employees in the certified unit, whereupon the Union filed charges of refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. The Board over Company opposition requesting a hearing on the ground that it had "evidence which was previously unavailable at the hearing on the challenged ballots, and which is highly perti-

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[4] 196 NLRB No. 106.

nent to the issues involved in the case" granted summary judgment and held that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the duly certified representative of its employees in an appropriate unit. The Company was ordered to cease and desist from the unfair labor practices found, to bargain on request and to post appropriate notices. To insure that the employees in the appropriate unit will receive the services of their selected bargaining agent for a reasonable time, the Board fixed the initial period of certification to begin on the date when the Company commences to bargain in good faith with the Union.[5]

[1] The Company's conceded refusal to bargain is based entirely on the contention that the Board's certification of the Union is invalid. It contends that the Board erred in determining which employees were eligible to vote in the election. The Company bears the burden of establishing that the Board's eligibility determination was erroneous. NLRB v. Hondo Drilling Company, 5 Cir. 1970, 428 F.2d 943, 946; NLRB v. Bar-Brook Mfg. Co., 5 Cir. 1955, 220 F.2d 832, 834; NLRB v. Atkinson Dredging Co., 4 Cir. 1954, 329 F.2d 158, 163-164, cert. denied 377 U.S. 965, 84 S.Ct. 1647, 12 L.Ed.2d 736.

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[5]See Mar Jac Poultry Co., Inc., 136 NLRB 785 (1962); NLRB v. Commerce Co., 5 Cir. 1964, 328 F.2d 600, 601, cert. denied, 379 U.S. 817, 85 S.Ct. 32, 13 L.Ed.2d 28; Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enforced, 10 Cir. 1965, 350 F.2d 57.

[2-5] The Stipulation controls unless its provisions are repugnant to the Act or to settled Board policies. As noted the agreement provided that "temporarily laid off" employees are eligible to vote. The dispute in the Board's proceedings and before us is as to whether particular employees are within this eligibility classification. Absent clear evidence of the parties' intention to apply some other test, the Board, we think, properly resolved this eligibility question in the same manner as in other cases where the eligibility of employees who do not work full time is in issue, namely, by determining the extent to which these employees share a community of interests with bargaining unit employees. Congress has granted the Board a "wide degree of discretion" in resolving such disputes. NLRB v. A. J. Tower Co., 1946, 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed. 322, 327.[6] We think that the Board's disposition of the challenged ballots was correct and well "within the sound discretion of the Board". NLRB v. Tri-Service Drilling Co., 5 Cir. 1970, 432 F.2d 1271, 1274. The challenged employees had a reasonable expectation of recall so as to justify their inclusion in the bargaining unit. Although the Company's business fluctuated it had a recurring yearly need for temporary seasonals during the tomato season and often during other seasons as well. All the challenged employees came from the same local labor market and all had worked for the Company in past years,

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[6]See NLRB v. Waterman S. S. Corp., 1940, 309 U.S. 206, 226, 60 S.Ct. 493, 84 L.Ed. 704; NLRB v. Tri-Service Drilling Company, 5 Cir. 1970, 432 F.2d 1271, 1274, cert. den. 401 U.S. 940, 91 S.Ct. 941, 28 L.Ed.2d 221; Shoreline Enterprises of America v. NLRB, 5 Cir. 1959, 262 F.2d 933, 942.

some for twenty years or more. Each had been employed in 1971 prior to the March 31 eligibility date and following a brief layoff about that time were in fact recalled to work. While the Company does not maintain a recall list of temporary seasonals, there is support in the record for the Hearing Officer's finding that its supervisors are directed to give hiring preference to former temporary seasonals who apply.

[6, 7] Although the Company argues that "[t]he Board erred in deciding the challenges in terms of its customary rules rather than in terms of whether they were eligible to vote as provided by and as intended by the parties in the Stipulation for Certification . . .", we agree with the Board that its responsibility in stipulated unit cases is twofold: "to ascertain the parties' intent with regard to the disputed employee and then to determine whether such intent is inconsistent with any statutory provision or with established Board policy". The Tribune Company, 190 NLRB No. 65, (1971); J. Olson Machine Co., 196 NLRB No. 89, (1972); Newhouse Broadcasting Corporation, 198 NLRB No. 60, (1972). In this case there is no evidence that the parties even discussed the inclusion or exclusion of temporary seasonal employees who were not working on the eligibility date, much less that they agreed on the issue. Instead the parties signed a Stipulation containing a standard eligibility clause which reflected, as the Hearing Officer noted, "uniform Board policy". Under that policy the Board, with the approval of this and other courts, has held that seasonal employees who are out of work because of a decline in their employer's business but who have a reasonable expecta-

tion of reemployment in the future are considered "temporarily laid off" and eligible to vote in a representation election. NLRB v. Hondo Drilling Co., supra; NLRB v. C.H. Sprague & Son, Co., 1 Cir. 1970, 428 F.2d 938, 940; NLRB v. Jesse Jones Sausage Company, 4 Cir. 1962, 309 F.2d 664, 665-667; Brewer & Brewer Materials, Inc., 182 NLRB 788, 793 (1970), affirmed 6 Cir. 1971, 436 F.2d 1383. Inasmuch as the Company has not shown that the parties reached any understanding as to the meaning of the printed eligibility clause, we think the Stipulation should be construed as incorporating the Board rule.

We agree with the Board that no understanding of the ineligibility of this group of employees is shown by reason of the fact that only eleven temporary seasonals on layoff status attempted to vote. The Board correctly observed that temporary seasonals on layoff status

> "were intentionally left off the eligibility list furnished by the Employer, because of the circumstance that they were not on the payroll on the agreed-upon eligibility date controlling for nonseasonal employees. Despite this, some of those in the temporary seasonal category but not on the Employer's list did cast ballots. Thus, to the extent that any failure to vote was caused by the action of any participant in the election process, the fault would appear to lie with the Employer in furnishing an incomplete eligibility list."

We hold that the Board properly construed the Stipulation in the light of established Board policy as approved by the courts. The Union was properly certified and the Company's refusal to recognize and bargain with the Union as the exclusive bargaining representative of its employees in an appropriate unit was a violation of Section 8(a)(5) and (1) of the Act. The Company's petition for review is denied and the Board's Order of January 12, 1973, is directed to be enforced in full.

Petition denied. Cross-Application for Enforcement granted.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KNAPP-SHERRILL COMPANY,
Petitioner,
versus No. 73-1358

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Filed: Feb. 12, 1974

Before: John R. Brown, Chief Judge, Godbold and Simpson, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the Knapp-Sherrill Company, to review an order of the National Labor Relations Board issued against Petitioner on January 12, 1973, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on December 5, 1973, and has considered the briefs and transcripts of the record filed in this cause. On January 21, 1974, the Court being fully advised in the premises, handed down its opinion denying the petition for review and granting enforcement of the Board's cross-application.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for

the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that the Knapp-Sherrill Company, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: Feb. 12, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1358

KNAPP-SHERRILL COMPANY,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

On Petition for Review of an Order of the
National Labor Relations Board
(Texas Case)

ON PETITION FOR REHEARING
(March 18, 1974)

Before BROWN, Chief Judge, GODBOLD and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer:

> "... (5) to refuse to bargain collectively with the representatives of his employees, subject to provisions of section 9(a)."

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer:

> "... (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"...

Section 7 of the Act provides:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activi-

ties except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). (Emphasis added)"

Section 9(a) of the Act provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: "...

Section 9(c)(1) provides:

"Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board - . . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election

by secret ballot and shall certify the results thereof."

Section 102.62(b) of the National Labor Relations Board Rules and Regulations and Statements of Procedure provides:

"(b) Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70."

201 NLRB No. 20 D-7007
Donna, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

KNAPP-SHERRILL COMPANY
and Case 23-CA-4484
AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL 173

DECISION AND ORDER

Upon a charge filed on August 23, 1972, by Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local 173, herein called the Union, and duly served on August 23, 1972, by Knapp-Sherrill Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 23, issued a complaint on September 6, 1972, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 20, 1972, following a Board election in Case 23-RC-3595 the Union was

duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about July 25, 1972, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 15, 1972, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 21, 1972, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 6, 1972, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the motion for summary judgment, Respondent basically

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[1]Official notice is taken of the record in the representation proceeding. Case 23-RC-3595, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

contends that the Board improperly certified the Union by failing to sustain challenges to 12 ballots cast by seasonal employees. The General Counsel maintains that the Respondent is attempting to relitigate the issues it raised in the related representation proceeding. We find merit in the General Counsel's position.

The record in the representation case, 23-RC-3595, reflects that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on April 29, 1971, which resulted in a vote of 85 to 84 in favor of the Union, with 18 ballots challenged. Both parties filed objections to the conduct of the election, none of which are in issue here.

After investigation, the Regional Director directed a hearing, which was conducted on July 27, 1971, on the issues raised by the objections and challenged ballots. Thereafter, on October 5, 1971, the Hearing Officer issued his Report and Recommendations, in which he recommended that the challenges to 5 ballots be sustained and that the challenges to the remaining 13 ballots be overruled. Twelve of the 13 ballots, the challenges to which were overruled, involved 11 temporary employees and 1 regular seasonal employee who, the Respondent argued, were ineligible to vote under the stipulation agreement because they were not employed during the eligibility period. However, the Hearing Officer found that they had a reasonable expectation of substantial employment from year to year, and were therefore eligible to vote. The Respondent filed excep-

tions to the report, and a supporting brief alleging, *inter alia*, that only 1 of the 13 remaining ballots should have been counted, and that the challenges to the other 12 ballots should have been sustained pursuant to the intent of the parties under the stipulation.

On May 15, 1972, the Board issued its Decision and Direction[2] in which it adopted the Hearing Officer's recommendations, sustained the challenges to 5 ballots and overruled the challenges to the remaining 13 ballots, including the 12 disputed by Respondent. Accordingly, it directed the Regional Director to open and count the 13 ballots and issue a revised tally of ballots.

Subsequently, the Respondent timely filed a motion for leave to file a motion for rehearing which the Board denied on May 24, 1972, on the grounds that it contained nothing that had not previously been considered by the Board. Thereafter, the Regional Director opened the 13 ballots and issued a revised tally of ballots which showed 93 votes for, and 88 votes against the Union, with 1 ballot void.

On May 31, 1972, Respondent filed an objection to the revised tally of ballots, reiterating its argument with respect to the 12 ballots. The Regional Director on June 2, 1972, issued his Supplemental Report on Employer's Objection to Revised Tally of Ballots, recommending that the Board overrule the objection and

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[2]196 NLRB No. 106, Chairman Miller dissenting.

issue a Certification of Representative. On June 20, 1972, the Board, in the absence of exceptions to the Regional Director's Report, issued its Supplemental Decision and Certification of Representative adopting the recommendations of the Regional Director, overruling Respondent's objection and certifying the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[4] We therefore find that

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[3]See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4]Attached to the response to the Notice To Show Cause is the affidavit of Mr. Scott Toothaker, an attorney who represented Respondent in preparing the election stipulation in the representation proceeding, concerning the intent of the parties to the stipulation with respect to the voting eligibility of "temporary seasonal employees." Despite the affiant's statement that he was unable to participate in the hearing on the challenged ballots due to "unavoidable conflicts in schedule," it does not appear that he requested a postponement. Further,

the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is, and has been at all times material herein, a partnership with its principal office and place of business located at 331 South 12th Street, Donna, Texas, where it is engaged in the business of processing, canning, and shipping of vegetables and fruits.

During the preceding 12 months, which period is representative of all times material herein, Respondent, in the course and conduct of its business operation, made sales of products valued in excess of $50,000 directly to customers located outside the State of Texas.

Respondent's C. M. Sherrill, Jr., testified at the hearing on the challenged ballots regarding the execution and understanding of the parties to the stipulation based on advice by Mr. Toothaker. In these circumstances, Mr. Toothaker's affidavit does not constitute newly discovered or previously unavailable evidence or special circumstances. Further, as the Board noted in fn. 2 of its Decision and Direction herein, provisions in the parties' preelection stipulation do not always preclude the Board from subsequently determining employees' voting eligibility in accord with customary precedent and policies under which it is normal to consider the identity of interests prevailing between employees concededly in the unit and others whose status is contested.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local 173, is a labor organization within the meaning of Section 2(5) of the Act.

III. Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Employer's Donna, Texas facilities, including warehousemen and truck drivers, excluding all office clerical employees, field men, guards, watchmen and supervisors as defined in the Act.

2. The certification

On April 29, 1971, a majority of the employees of Respondent in said unit, in a secret ballot election con-

ducted under the supervision of the Regional Director for Region 23 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on June 20, 1972, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 3, 1972, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 25, 1972, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since July 25, 1972, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett*

Construction Company, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Knapp-Sherrill Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local 173, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at the Employer's Donna, Texas, facilities, including warehousemen and truck drivers, excluding all office clerical employees, field men, guards, watchmen and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 20, 1972, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 25, 1972, and at all times thereafter, to bargain collectively with the

above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent had engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Knapp-Sherrill Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment, with Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Lo-

cal 173, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees at the Employer's Donna, Texas facilities, including warehousemen and truck drivers, excluding all office clerical employees, field men, guards, watchmen and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Donna, Texas, facilities copies of the attached notice marked "Appendix."[5] Copies of

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[5]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

said notice, on forms provided by the Regional Director for Region 23 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 23 in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith

Dated, Washington, D.C. Jan. 12, 1973

_____

John H. Fanning,
Member

_____

Howard Jenkins, Jr.,
Member

_____

John A. Penello,
Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

CHAIRMAN MILLER, dissenting:

I dissented in the Decision and Direction in Case 23-RC-3595 as in my view the Respondent's interpretation of the stipulation has validity and I would so interpret the stipulation. Further, the record herein falls short of establishing that the seasonal employees had any genuine likelihood of reemployment. I therefore would not grant the General Counsel's Motion for Summary Judgment as I do not agree with the conclusion herein that Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union.

Dated, Washington, D.C. Jan. 12, 1973

Edward B. Miller,
Chairman
NATIONAL LABOR
RELATIONS BOARD

196 NLRB No. 106 D-6297
Donna, Texas

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

KNAPP-SHERRILL COMPANY
Employer
and Case 23-RC-3595

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL 173
Petitioner

DECISION AND DIRECTION

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted in the above-entitled proceeding on April 29, 1971, under the direction and supervision of the Regional Director for Region 23 of the National Labor Relations Board. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations. The Employer and Petitioner both timely filed objections to the conduct of the election.

The tally of ballots shows that there were approximately 179 eligible voters and that 171 ballots were cast, of which 85 were for the Petitioner, 84 were

against the Petitioner, and 18 were challenged. There were 2 void ballots.

Inasmuch as the challenged ballots are sufficient in number to affect the results of the election, the Regional Director conducted an investigation of the objections and challenged ballots and thereafter, on July 1, 1971, issued and served on the parties his order directing hearing and notice of hearing. In his order, the Regional Director found that his investigation of the objections[1] and challenged ballots raised substantial issues and questions which could best be resolved by a hearing.

Accordingly, on July 27, 1971, a hearing was held before Arnold Ordman, duly designated as Hearing Officer, who, on October 5, 1971, issued his Report and Recommendations attached hereto. Thereafter, the Employer filed exceptions and a supporting brief to the Hearing Officer's report.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purpose of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

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[1]The Petitioner subsequently withdrew its objections.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All production and maintenance employees, including warehousemen and truck drivers employed at the Employer's facilities located at 331 South 12th Street, Donna, Texas.

Excluded: All office clerical employees, field men, watchmen, guards and supervisors, as defined in the Act.

5. The Board has considered the challenges and the matter of the signed ballot, the Hearing Officer's report, and the Employer's exceptions and brief and hereby adopts the Hearing Officer's findings, conclusions, and recommendations.[2]

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[2]The principal issue herein concerns the voting eligibility of some 11 employees designated by the parties as "temporary seasonals" whose ballots were challenged by the Board agent because their names did not appear on the eligibility list. We adopt the Hearing Officer's findings and overrule the challenges to these ballots because the record shows that these voters had a reasonable expectation of recurring employment with the Employer from year to year. *Baumer Foods, Inc.*, 190 NLRB No. 137. Further, although our dissenting colleague indicates that scores of other temporary seasonal employees whose temporary period of employment had ended similarly made no attempt to vote, we note that the Employer prepared

DIRECTION

It is hereby directed that the Regional Director for Region 23 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Decision and Direction, open and count the 13 ballots of employees Jesusa Aguillar, Maria Benitez, Maria Cardenas, Juanita De LaGarza, Refugia Guzman, Juana Martinex, Abeline Ramirez, Maria O. Ramirez, Guadalupe Torres, Petra Torres, Juanita Zamora, Jovita Zamora, and Leandro Guerrero and, thereafter, prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said bal-

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the eligibility list which named 179 individuals. Thus it is apparent that the Employer understood the stipulation as we do, that it permitted such types of "seasonal" employees to vote. This group included approximately 100 persons in the disputed category whom the Employer believed to be properly qualified to vote and almost all of them cast ballots. The remainder, some of whom did not vote, were intentionally left off the eligibility list furnished by the Employer, because of the circumstance that they were not on the payroll on the agreed-upon eligibility date controlling for nonseasonal employees. Despite this, some of those in the seasonal category but not on the Employer's list did cast ballots. Thus, to the extent that any failure to vote was caused by the action of any participant in the election process, the fault would appear to lie with the Employer in furnishing an incomplete eligibility list. The Board has held that provisions in the parties' preelection stipulation do not always preclude the Board from subsequently determining employees' voting eligibility in accord with customary precedent and policies under which it is normal to consider the identity of interests prevailing between employees concededly in the unit and others whose status is contested. *American Printers & Lithographers, Inc.*, 179 NLRB 1179. Finally, we note that of the approximately 250 total employees eligible to vote in this election 171 cast ballots, a very substantial proportion of participation.

lots, upon the basis of which he shall issue the appropriate certification.

Dated, Washington, D.C. May 15, 1972

John H. Fanning,
Member

Howard Jenkins, Jr.,
Member

John A. Penello,
Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

CHAIRMAN MILLER, dissenting:

We are here asked to interpret a stipulation pursuant to which employees "who were employed during the payroll period" specified were to be eligible to vote. Also eligible under the stipulation are employees "temporarily laid off."

The problem arises because certain employees referred to by the parties as "temporary seasonal employees" and who were not actively at work during the payroll period, cast challenged ballots.

The Employer asserts that it was the intent of the stipulation to permit voting by such of those temporary seasonal employees as were actively employed during the payroll period, since the term "temporarily laid off" has no application to this category of employees. The Employer notes that such employees work for uncertain and brief periods during the peak season and that, therefore, the concept that such employees can be "temporarily laid off" is a farfetched one and one not contemplated by the stipulation. According to the Employer, scores of other temporary seasonal employees, whose temporary period of employment had ended in the same manner as those challenged here, made no attempt to vote thus underlining the absence of any understanding that such persons were intended to be eligible as coming within the term "temporarily laid off."

Instead, it is contended, employees of this nature are not laid off — their term of employment has simply ended.

I am persuaded that these contentions have validity and would so interpret the stipulation here.

In addition, even if we were to apply our normal standards of expectation of re-employment, the record here falls far short of establishing that the individuals

in issue each had a work record with this Employer which demonstrates any genuine likelihood of their re-employment. Instead it shows that *some* temporary seasonals return in successive years while others do not. There is a paucity of evidence as to the specific individuals who cast challenged ballots here.

For these reasons I dissent from the findings of my colleagues.

Dated, Washington, D.C. May 15, 1972

Edward B. Miller,
Chairman
NATIONAL LABOR
RELATIONS BOARD

NOTE: Hearing Officer's Report and Recommendations Omitted

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of April, 1974, three copies of the above and foregoing Petition For Writ of Certiorari were mailed, postage prepaid, to Mr. Elliott Moore, Deputy Associate General Counsel, Office of the General Counsel, National Labor Relations Board, Washington, D.C. 20570, Counsel for Respondent; Regional Director, Region 23, National Labor Relations Board, 4th Floor Dallas-Brazos Building,

1125 Brazos Street, Houston, Texas 77002; and to Solicitor General, Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

GLENN JARVIS
Post Office Box 3670
McAllen, Texas 78501
512/686-3771
Counsel for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1641

KNAPP-SHERRILL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 488 F. 2d 655. The Board decision and order in the unfair labor practice case (Pet. App. 16a-29a) are reported at 201 NLRB No. 20. The decision and order in the related representation case (Pet. App. 30a-36a)[1] are reported at 196 NLRB 1072.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1974 (Pet. App. 11a). The petition for a writ of certiorari was filed on May 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The Hearing Officer's Report and Recommendations are omitted from petitioner's appendix. They are set forth at A. 19-31. ("A." refers to the appendix to the briefs filed in the court of appeals.)

QUESTION PRESENTED

Whether the Board properly overruled the company's challenges to ballots cast by 11 "temporary seasonal" employees in a representation election conducted pursuant to a stipulation agreement between the union and the company.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 13a-15a.

15a.

STATEMENT

Petitioner is engaged in the processing of various vegetables and fruit juices (Pet. App. 3a). It employs 50 to 60 regular full-time workers and 30 to 35 "regular seasonals" are hired when a particular crop comes in. During the tomato canning season additional employees (170 to 200 in 1970, for example) are required; these "temporary seasonals" receive hiring preference when additional help is required throughout the year. Thus, many work on a regular basis during the busy season (Pet. App. 4a).

On March 11, 1971, the Union[2] filed a petition for certification as bargaining representative (A. 19). Shortly thereafter a "Stipulation for Certification upon Consent Election" was signed in which the parties agreed to proceed to an election in a bargaining unit including "[a]ll production and maintenance employees * * * employed at the Employer's facilities at * * * Donna, Texas", and that the election would "be held

[2]Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 173.

in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board." Regarding voter eligibility the Stipulation provided (Pet. App. 2a):

> The eligible voters shall be those employees included within the Unit * * * who were employed during the [March 31, 1971] payroll period * * *, including employees who did not work during the payroll period because they were * * * temporarily laid off * * *.

Pursuant to the Stipulation an election was conducted on April 29, 1971; 85 votes were cast for the Union, 84 against, and 18 were challenged because the voters' names did not appear on the Company's eligibility list. A hearing was held and the Hearing Officer upheld 13 of the 18 challenged ballots; 11 of the 13 were cast by temporary seasonal employees (Pet. App. 3a). In rejecting the Company's contention that these employees were not eligible to vote, the Hearing Officer considered the Stipulation's eligibility provision and concluded that (A. 28-29):

> "temporary seasonals," worked under the same general conditions as the "regular seasonals" whose eligibility is not questioned. The difference rests only in the circumstance that their periods of employment were shorter and less certain than those of the "regular seasonals." * * * Because of this work history and because the record otherwise demonstrates that each had a reasonable expectation of substantial employment from year to year, I find that they shared a community of interest with the Employer's regular work force and the "regular seasonals."

The Board (Chairman Miller dissenting) adopted the Hearing Officer's Report (Pet. App. 30a-36a). The revised tally showed a 93-88 Union majority, and the Union was certified as the employees' representative (Pet. App. 19a20a). The Company then refused to bargain and the Union filed charges alleging a violation of Section 8(a)(5) and (1) of the Act. The Board (Chairman Miller dissenting) rejected the Company's contention that it had "evidence which was previously unavailable at the hearing on the challenged ballots" (Pet. App. 5a) and granted the General Counsel's motion for summary judgment. The Board ordered the Company to bargain with the Union (Pet. App. 16a-29a).

In the court of appeals the Company argued that the "Board erred in deciding the challenges in terms of its customary rules rather than in terms of whether they were eligible to vote as provided by * * * the parties in the Stipulation" (Pet. App. 8a). The court recognized that the "Stipulation controls unless its provisions are repugnant to the Act or to settled Board policies," but found that there was "no evidence that the parties even discussed the inclusion or exclusion of temporary seasonal employees who were not working on the eligibility date, much less that they agreed on the issue" (Pet. App. 7a-8a). Absent such evidence of agreement, the court approved the Board's use of its customary standard in determining whether the challenged voters fell within the "temporarily laid off" provision of the Stipulation. Reviewing the evidence presented to the Hearing Officer, the court affirmed the Board's finding that the 11 employees had a "reasonable expectation of recall so as to justify their inclusion in the bargaining unit," and enforced the Board's order (Pet. App. 7a-10a).

ARGUMENT

Petitioner contends that the Board ignored the parties' agreement in applying general eligibility principles to determine whether the ballots of the temporary seasonals should be counted (Pet. 11-13). However, the Stipulation simply provided that "employees who did not work during the payroll period because they were * * * temporarily laid off" (Pet. App. 2a) would be eligible to vote. Such "boilerplate" language, read in the light of the further statement that the election would "be held in accordance with * * * the applicable procedures and policies of the Board" (*ibid.*), may reasonably be construed—absent clear evidence that a contrary interpretation is intended—as incorporating the general Board rule that seasonal employees who are out of work on the eligibility date but have a reasonable expectation of reemployment in the future are eligible to vote in a representation election.[3] The only question really presented is whether the Board and the court below were correct in finding that there was no probative evidence that the parties intended a contrary interpretation, *i.e.*, that only those temporary seasonals who were on the March 31, 1971 payroll would be eligible to vote. Such an issue, which turns on the facts of this particular case, does not warrant review by this Court.

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[3]Petitioner does not here contest the Board's finding that the 11 temporary seasonal employees would properly be included in the unit under this standard. See *National Labor Relations Board* v. *C.H. Sprague & Son Co.*, 428 F. 2d 938, 940 (C.A. 1); *National Labor Relations Board* v. *Hondo Drilling Co.*, 428 F. 2d 943, 946 (C.A. 5); *National Labor Relations Board* v. *Jesse Jones Sausage Co.*, 309 F. 2d 664, 665-667 (C.A. 4).

In any event, the findings of the Board and the court below are fully justified. As the court below noted (Pet. App. 8a), "there is no evidence that the parties even discussed the inclusion or exclusion of temporary seasonal employees who were not working on the eligibility date, much less that they agreed on the issue." Nor was this deficiency cured by the belated and self-serving statements (Pet. 8-9, notes 4 and 5) which the Company adduced before the Board.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]By contrast, in *Tidewater Oil Co.* v. *National Labor Relations Board,* 358 F. 2d 363 (C.A. 2), relied on by petitioner (Pet. 11), the party contending for an unusual construction of the Stipulation produced persuasive evidence that each employee was discussed by name and his eligibility agreed upon prior to executing the Stipulation (*id.* at 364).